IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1 OF 2007
IN
CONFIRMATION CASE NO.2 OF 2007

WITH
CRIMINAL APPEAL NO.1086 OF 2006
(By original Accused No.1 & 3)

WITH
CRIMINAL APPEAL NO.156 OF 2007
(By original Accused No.2)

The State of Maharashtra
(Through Manikpur Police
Station, Taluka Vasai,
District Thane) .. Applicant
(Orig.Complainant)

V/s

1. Dilip Premnarayan Tiwari
   Age 25 years,
   R/o Room No.444, Khatrinagar,
   Khairpada, Waliv, Taluka Vasai

2. Sunil Ramashray Yadav
   Age 20 years,
   R/o Waliv, Near Marathi School,
   Taluka Vasai, District Thane

3. Manoj Tulshi Paswan
   Age 22 years .. Respondents
(Orig.Accused Nos.1 to 3)

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Mr.S.R.Borulkar, Public Prosecutor with Mr.A.R.Patil (APP) for the Applicant-State.

Mr.Ramakant Patil Sr.Counsel with Mr.Shivraj Patil for Accused No.1 in Confirmation Case No.2/2007 (and for Appellant No.1 in Appeal No.1086/2006).

Mr.S.N.Raj with Mr.S.L.Shukla for Accused No.2 in Confirmation Case No.2/2007 (and for the Appellant in Appeal No.156/2007).

Mr.Sandesh D.Patil for Accused No.3 in Confirmation Case No.2/2007 (and for Appellant No.2 in Appeal No.1086/2006)

CORAM : DR.S.RADHAKRISHNAN, &
SMT.R.S.DALVI, JJ.

DATE : 1st November, 2007.

P.C.:

1. Heard the lerned Public Prosecutor for the State and the learned Counsel for the Accused. This is an application filed by the Prosecution, seeking this Court's permission to adduce additional evidence to prove two Chemical Analyser's Reports bearing Nos.B-1868/2004 and B-2067/2004 dated 17.1.2005

2. There is no dispute that the said reports were lying with the Investigating Officer right from January-2005 and were not produced before the trial Court, though available.

3. The learned Counsel for the Accused strongly oppose the above application as the same would cause severe prejudice to the accused.

4. We are not inclined to grant the above application, by exercising our discretion, as it would clearly amount to filling up of the lacunae of the prosecution case, as has been held by the Supreme Court in the case of **Bir**

Singh V/s.State of Uttar Pradesh - (1977) 4 SCC 420.

The relevant observations of the Supreme Court in paragraph No.10A of the aforesaid judgment read as under:-

> "10A. That although the F.I.R. has been lodged at 7.30 p.m. at Kotwali Police Station at Unnao yet according to the Investigating Officer the seal of the S.P.Office dated November 9, 1967 was given by mistake as the F.I.R.could have been received on the next date i.e. November 10, 1967 because the office of the S.P.closed at 5 p.m. on November 9, 1967. There does not appear to be any room for such a clerical mistake unless it be held that the F.I.R.must have been actually prepared on November 10, 1967 so that it was not in existence on November 9, 1967. On this point the High Court has disagreed with the Sessions Judge on a purely speculative ground. Before the trial Court the Public Prosecutor did not challenge the statement of the Investigating Officer that the seal was dated November 10, 1967 which indicated that the F.I.R.was received by the S.P.Office on that date. The theory of mistake put forward by the Investigating Officer seems to have been accepted by the prosecution. No application was made to the Sessions Judge to call for the records of the S.P.Office or any witness from there to find out as to when actually the F.I.R. was received. It is, therefore, manifest that the case itself was that the F.I.R. was received in the S.P. Office on November 10, 1967 which lent intrinsic support to the suggestion of the defence that the F.I.R. was lodged on November 10, 1967 and was not lodged on November 9, 1967 when it was purported to have been lodged. The High Court brushed aside the finding of the Investigating Officer on the ground that the explanation given by him was wrong because he may not have been in the know of things. This process of reasoning is purely speculative. PW 5 Umesh Chandra Varma the Investigating Officer was attached to the Kotwali Police Station in the town of Unnao where the office of the S.P. was situated. He had every day dealings with the S.P.Office and he must be presumed to know the exact state of affairs. The Investigating Officer's evidence that the office of the S.P.closes at 5.00 p.m. had not been challenged by the prosecution before the Sessions Judge nor any attempt was made to put further question in re-examination to clarify the matter. The High Court however on its own examined one Ejaz Hussain

from the office of the S.P. to prove that the F.I.R. was itself received in the S.P.Office on November 9, 1967, and, therefore, the explanation given by the Investigating Officer was wrong. It is well settled that though an Appellate Court has power to take additional evidence in a suitable case yet the discretion should not be exercised to fill up gaps or lacunae in the prosecution evidence. If the prosecution was serious about this matter there was no reason why Ejaz Hussain could not be examined before the Sessions Court. The prosecution, therefore, appears to have accepted the plea of the Investigating Officer and left it at that. In these circumstances the High Court was not correct in exercising its discretion in examining Ejaz Hussain in its appellate jurisdiction. We have carefully perused the evidence of Ejaz Hussain given before the High Court and we are of the opinion that Ejaz Hussain is an utterly unreliable witness on whom no reliance can be placed at all. This witness has clearly stated that the office hours of the S.P. are from 10 a.m. to 5.30 p.m. and 30 to 35 persons work in the said office. He, however, states that while the officials leave at 5.30 p.m. the witness leaves office at 7.00 p.m. and after he closes his room no one sits in that room. The witness further admits that the seal is not kept in his room but is kept in another room in the said office which is closed at 5.30 p.m. In these circumstances therefore even if the witness states that he received the copy of the F.I.R. he would not be in a position to any seal on the F.I.R.which was in the room which was locked at 5.30 p.m. On a direct question being put to him as to when he went to the office again after closing on November 9, 1967 the witness stated "I did not go to the office after 7 p.m. nor did my clerk constable go to the office after 7 p.m. that day". It is obvious that the F.I.R. could not have reached the office at 7 p.m. because it was itself lodged at 7.30 p.m. If the witness had left at 7 p.m. there could be no question of his receiving the F.I.R. after 7.30 p.m. The witness is unable to decipher the initial of the person who had initialled the endorsement. Later on he in his statement states that he usually left the office at 7 p.m. but sometimes he left at 7, 8 or 9 p.m. according to the volume of work. The witness further says that no register is kept in the Police Office in which the timings of arrival and departure of the witness are recorded which does not appear to be true because an office like that of the S.P. where as may as 30 to 35 persons work daily it is difficult to believe that the office would not have any attendance register showing the time of arrival and departure of the officials. It

seems to us that this witness has tried to support the prosecution case by showing his presence on November 9, 1967 till 9 p.m. although in his previous statement before the same Court he categorically stated that on November 9, 1967 he had left the office at 7 p.m. In these circumstances we place no reliance on the evidence of this witness. The High Court indulged in another conjecture that the F.I.R.must have been sent to the P.P. and to the Elaqa Magistrate. This was not however a matter of which judicial notice could be taken but had to be proved like any other fact. There was absolutely no evidence led by the prosecution to show when the F.i.R. was sent to the Elaqa Magistrate or to the P.P's office and in the absence of any evidence on this point the High Court was not justified in drawing an inference in order to demolish the positive and categorical statement of PW 5 Umesh Chandra Verma the Investigating Officer."

5. Under the aforesaid facts and circumstances, we dismiss the above application.

(SMT.R.S.DALVI, J.) **(DR.S.RADHAKRISHNAN, J.)**